No. 188 36

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT
v.
WILLIAM LUCIAN COBB, et al, APPELLEES

Appeal From The United States District Court
For the Northern District of California

Brief of Appellees

Hurley and Bigler
Yreka, California

Morley, Thomas & Orona
80 East Maple St.
Lebanon, Oregon

Weatherford, Thompson & Horton
130 West First Ave.
Albany, Oregon
Attorneys for Appellees

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STATEMENT

The appellees accept the statment of facts as outlined by the appellants, except as hereinafter excepted to or supplemented.

The United States brought suit for condemnation and immediate possession of some 40.52 acres of land (R. 21) for road purposes over and across approximately 21 mining claims owned by the appellees.

There is nothing in the record to indicate that any issue will be made as to the validity of the mining claims or the right of possession therein by the appellees. The subjacent support, or toe, to support the roadway and the area covered thereby, is not described in the complaint. This additional area will be extensive as it is noted that the area is hilly and in a steeply sloped—steep-walled canyon. (EX. 3 R. 104).

A report was made by one Milvoy Suchy, a mining engineer who was an employe of the Department of Agriculture to the Secretary of Agriculture commenting upon the proposed easement sought by the government. This report is dated January 23, 1961. (R. 103). A patent application filed by the appellees had been previously pending since the year 1960 on three of the claims. (R. 123). It was the duty of Milvoy Suchy to make appropriate reports in regard to the patent

claims to the Bureau of Land Management and to assist in the issuance of patents, and he was particularly assigned to review these claims (R. 93, 124). The report of Mr. Suchy made on January 23, 1961, to the Secretary of Agriculture contained the following statement:

> "The claimants, E. T. Cobb, et al, have stated that they intend to apply for patent to the entire group of placer claims. At the present time a patent application is pending before the Sacramento Land Office for three claims; the Alta, Bright Gold, and Old Gold claims. These claimants have done most of their testing within the boundaries of these three claims and it is possible that one or all three of these may go to patent. ." (EX. 3).

For some unexplained reason, the report required by Mr. Suchy to the Bureau of Land Management to assist the appellees in securing their patent, was not supplied by him until the month of November, 1962, (R. 124) after the government had filed its condemnation proceeding.

Milvoy Suchy had never previously appraised a mineral deposit for condemnation. (R. 107). The report that Suchy filed with the Secretary of Agriculture, which allegedly was solely relied upon by the said Secretary, did not estimate or appraise the damages that would occur to the property values of the appellees in case the easement were obtained by the government. The only reference in the report to the

effect of the easement upon the mining claimants is the last sentence of the report, to-wit:

> "The writer believes that the **mining claimants rights under the general mining law,** are unaffected by the provisions of the proposed interruptable easement." (EX. 3) (Emphasis supplied)

Although the Court repeatedly endeavored to get Mr. Suchy to state whether he had made an estimate of the monetary loss that would be suffered by the appellees, the witness either evaded the answer or in effect admitted he had made no attempt to so estimate. (R. 112-117). Counsel for the government endeavored to clarify the matter, but no testimony was submitted in support of the statements by counsel. (R. 117-118). Mr. Suchy made no effort to ascertain from mining engineers or prospective purchasers of mining claims, whether or not the value of the claims would be reduced by the proposed easement, and expressed little or no knowledge of the results. (R. 119-122). The appellees would be confined to mining the premises in accordance with the dictates and in the manner required by the Forest Service. (R. 129A).

Counsel for the government conceded that the issue on the hearing "is whether or not he (Suchy) submitted an estimate as to the damages of this particular easement to the Secretary of Agriculture and the Secretary of Agriculture **had a right to rely there-**

on." (R.130) (Emphasis supplied) The appellees, in case the easement were granted, would be denied the right to re-mine the property or return for the removal of any of the black sands or other potentially valuable minerals that would not be removed in the first mining of the property, because under the terms of the easement when the road was replaced by the government after the first mining, the easement would become permanent and the road could not thereafter be destroyed or removed by the appellees. (R.132-133)

No consideration was given by Mr. Suchy to the probability of additional damages to the appellees resulting from the bringing in of additional rock and materials to be placed on the roads by the government or the construction of the by-pass roads, or in repairs. (R.134-135)

The witness stated that he was under the impression that the government was only trying to get the right to use the road which had already been built across these mining claims. (R.99) However, he finally admitted that other roads such as the Dutch Creek Road would be constructed under the terms of the easement. (R.110-11) The court observed that although the witness testified the road would be no detriment, that it was obvious that the appellees would be required to remove materials they would

not ordinarily have to remove. The ignoring of this fact affected the Court's opinion of his testimony. (R.112)

There is included in the photocopies of the transcript of record prepared by the appellants the motions filed by the appellees on May 28, 1962. (R.60-61) However, appellant has failed to include in the photocopies of the transcript of record the affidavit of Eldred T. Cobb which was attached to and by reference made a part of the motions. In order that the Court may have ready access to the omitted affidavit, we are setting it forth in the appendix to this brief commencing on page 32.

In the Court's memorandum and order which is being appealed, the Court made a specific finding as follows, to-wit:

> "Under such a set of circumstances, it cannot be said that the estimate by the Department of Agriculture that just compensation for the taking of the easement would be $1 was made in good faith, that is, with a reasonable basis for belief as to its accuracy." (R. 79).

In reaching that conclusion, the Court heard the entire testimony of Mr. Suchy, the only witness selected by the government, and made the following comment in respect to that witness' testimony:

> "I deem it only fair to state that I, as the trier of the facts here involved, was not impressed with

Mr. Suchy as a witness. To be perfectly candid, his testimony was so unsatisfactory to me, as to leave me with a fixed and abiding doubt concerning the opinion expressed by him." (R. 75).

SUMMARY OF ARGUMENT

I

Failure of the government to comply in good faith with the requirements of the declaration of taking statute renders the declaration of taking a nullity, therefore the same can be set aside by the District Court.

Courts of appeal generally have recognized that the District Court has jurisdiction to inquire into the question of whether or not the condemning agency has in good faith complied with the requirements of the declaration of taking statute. The purpose of the inquiry is not to determine whether the amount of the deposit is adequate, but to determine whether the amount was arrived at in good faith in accordance with the requirements of the statute.

If the District Court does not have jurisdiction to determine whether or not the declaration of taking statute has been complied with in good faith, then landowners are left at the mercy of possible capricious, arbitrary, bad faith action by government agencies.

II

Where the good faith of the condemning agency is challenged by the landowner and is supported by a prima facie showing of lack of good faith, a justiciable issue is presented to the District Court and it is the duty of the District Court to hold a hearing to determine the issue of whether or not the acquiring agency acted in good faith in making its estimate of just compensation in the amount deposited with the declaration of taking. Appellees made a prima facie showing of lack of good faith through the affidavit of Eldred T. Cobb, which is set forth in the appendix of this brief. It then became the duty of the appellant to present evidence to overcome this prima facie showing. The District Court found that the government failed to establish that the estimate of just compensation was made in good faith and on the basis of some reasonable appraisal.

The findings of the District Court are supported by substantial evidence and should not be reversed or set aside on appeal.

The declaration of taking statute requires that an estimate of just compensation must be made by the condemning authority and the amount deposited in court. "Estimate" means to set a value on or to appraise. "Just compensation" means the value of the

property taken at the time of the taking. The evidence presented by the appellant affirmatively shows that a mining engineer without previous appraisal experience was selected to examine the mining claims; that he did not appraise the value of the easement taken nor did he make any attempt to place a dollar amount on the damages resulting from the taking of the easement. The report submitted to the Secretary of Agriculture by the Department's Mining Engineer was wholly inadequate and insufficient to serve as the basis for an estimate of just compensation for the value of the easement taken. The general counsel for the Secretary of Agriculture should have so advised him. Hence the purported determination of just compensation made by the Secretary of Agriculture does not comply with the requirements of the declaration of taking statute and is a nullity.

"Bad faith" implies a breach of faith or a failure to perform a duly imposed duty. The Secretary of Agriculture failed to perform the duty imposed upon him by the declaration of taking statute in that he purported to make an estimate of just compensation without having any reasonable basis upon which to base his determination; therefore, his action amounted to bad faith.

The mining engineer who examined the claims for

the Secretary of Agriculture also made a mineral examination of the claims and filed a report with the Bureau of Land Management in connection with a patent application made by the appellees on three of the claims. The patent application was filed in 1960 long prior to the filing of the condemnation complaint. The mining engineer made a written report to the Department of Agriculture on January 23, 1961, yet he failed to file a report with the Bureau of Land Management until November, 1962, thereby preventing the appellees' application for a patent from being processed until after the condemnation complaint and declaration of taking were filed. This long delay in filing his report with the Bureau of Land Management is further evidence of lack of good faith.

The purpose of the hearing before the District Court was to determine whether or not the amount of $1 deposited with the declaration of taking was an estimate of just compensation arrived at in good faith by the Secretary of Agriculture. The hearing did not consider the question of whether or not the amount deposited was adequate.

III

Appellees concur with appellant that the order of the District Court dated March 14, 1963, is an appealable order for the reason that the order makes a

final determination of rights of the appellant adverse to the appellant.

However, if the Court of Appeals is of the opinion that the order of the District Court is not appealable, then appellees concur with appellant that the order of the District Court should be reviewed under the petition for mandamus.

It is of importance to both parties that the issue presented be determined on its merits thereby eliminating the possibility of a subsequent appeal after the issue of just compensation has been tried in the District Court.

ANSWER TO SPECIFICATION OF ERROR I

POINTS AND AUTHORITIES

I

A District Court has jurisdiction to vacate a declaration of taking where, contrary to the implied requirements of the statute, the estimate of the value of the condemned property is made by the government in bad faith.

City of Oakland v. United States, 124 F. 2d 959, 963 (C. A. 9, 1942)
Simmonds v. United States 199 F. 2d 305, 307 (C. A. 9, 1952)
United States v. 44.00 acres of land, etc., 110 F. Supp. 168 Rev'd 234 F. 2d 410, 415 (C. A. 2, 1956)

United States v. 29.4 acres of land, 131 F. Supp. 84, 87 (D. C. New Jersey, 1955)
Travis v. United States, 287 F. 2d 916, 919 (Ct. of Claims 1961)
United States v. 45.33 acres of land, 266 F. 2d 741 (C. A. 4 1959)
United States v. 64.88 acres of land, 244 F. 2d 534 (C. A. 3)
United States v. Meyer, 113 F. 2d 387, 392 (C. A. 7, 1940)
United States v. Threlkeld, 72 F. 2d 464, 465 (C. A. 10, 1934)

The appellant contends that whether or not there was bad faith, or whether or not there was a compliance with the statute, the Courts are absolutely powerless to intervene or reverse any action taken by an administrative authority. The lower Court disagreed with this contention.

It is the position of appellees that the failure of the appellant to comply in good faith with the requirements of the declaration of taking statute renders the declaration of taking a nullity and, therefore, the same can be set aside by the District Court.

In the City of Oakland v. United States, 124 F. 2d 959, a case from the Court of Appeals, Ninth Circuit, at page 963, it is stated:

> ". . . The answer of the District Court to these suggestions merits quotation: 'Assuming for purposes of argument that it is ultimately determined that the declaration of taking is affected with fraud or bad faith, it would follow that the declaration of taking will be a nullity, ineffective to vest title, and that the judgment thereon would also be a nullity . . ."

The Ninth Circuit also recognized the power of the District Court to inquire into the question of bad faith on the part of the condemning agency in Simmonds v. United States, 199 F. 2d 305, 307 where it is stated:

> ". . . Discretion as to the extent, amount or title of property to be taken by the United States has been conferred by legislation upon the Secretary of the Army; and in the absence of bad faith or abuse of that discretion his determination is final . . ."

The District Court for the Western District of New York in United States v. 44.00 acres of land, 110 F. Supp. 168, 171 stated:

> ". . . There can be no doubt that the court may not substitute its judgment for what is just compensation for the administrative determination of the acquiring authority. That however, does not mean that the court is without power to review an administrative determination involving the statutory requirement under the declaration of taking statute of a statement of estimated just compensation, where the good faith of the acquiring authority is unequivocally challenged and where the challenge is supported by a prima facie showing of lack of good faith and noncompliance with the statute."

The above decision was appealed and the Court of Appeals for the Second Circuit in United States v. 44.00 acres of land, 234 F. 2d, 410, 415 reversed the decision of the District Court in dismissing the declaration of taking for the reason that the government with its first declaration of taking deposited $300,000 and with its amended declaration of taking deposited an additional $200,000. However, the Court of Appeals stated:

> ". . . We may concede, arguendo, that a court has jurisdiction to vacate a Declaration of Taking where, contrary to the implied requirements of the statute, the estimate of the value of the condemned property is made by the Government in bad faith. But here the estimate was raised to an amount which the evidence shows to have been arrived at in good faith . . ."

The Second Circuit thereby recognized that the question of lack of good faith could be inquired into by the District Court.

Appellant relies heavily on the case of in re United States 257 F. 2d 844 (C. A. 5, 1958), cert. den, 358 U. S. 908. This decision of the Fifth Circuit can be distinguished on the basis of the facts involved. In in re United States, a deposit of $100,000 was made with the filing of the original declaration of taking and thereafter the deposit was increased to $400,500. Based on these facts the Fifth Circuit held the District Court

could not properly dismiss the declaration of taking. In the instant case, the deposit is only $1.

The Court of Claims in Travis v. United States, 287 F. 2d 916, 919, has cited in re United States as authority for the statement:

> "It has been held that judgment entered on a declaration of taking cannot be vacated and that the Court has no power to strike the declaration itself in the absence of bad faith."

Thus, it is to be seen that the Court of Claims, being fully cognizant of the holding of the Fifth Circuit, refused to adopt the extreme views which the appellant now presses on this Court and apparently adopts the position which was approved by the Ninth Circuit in City of Oakland v. United States, supra, and Simmonds v. United States, supra.

We have found only two cases in which the government paid into Court only the sum of $1 with its declaration of taking. One case is United States v. 45.33 acres of land, 266 Fed 2d 741 (C. A. 4, 1959). In that case the government paid $1 into Court with its declaration of taking. The landowner challenged the good faith of the government in arriving at the estimated value of $1 and put on evidence to establish a prima facie case of lack of good faith. The government was given an opportunity to put on evidence to establish its good faith in arriving at the sum $1, but failed

to do so, whereupon the District Court dismissed the declaration of taking. The government then appealed to the Fourth District and contended that the District Court did not have power to review the question of good faith on the part of the government. The Fourth Circuit declined to review the question of good faith but held that the District Court had a right to dismiss the declaration of taking because the government refused to comply with the Court's ruling that it must present evidence to overcome the landowner's prima facie case of lack of good faith on the part of the government. The Court of Appeals thereby recognized the propriety of the District Court holding a hearing on the issue of lack of good faith.

The other case in which $1 was deposited is United States v. certain interests in property, 163 F. Supp. 518, 520-21 (D. C. Mont. 1958). The defendant landowners objected that the sum of $1 was a mere nominal deposit and did not comply with the statute. Thereafter, the United States amended its declaration of taking and increased the estimated just compensation to the sum of $75,000, which amount was deposited with the Clerk of the Court. The District Court then held that the United States had a right to make such amendment and that since the amount deposited in Court was substantial, that it cured the defect complained of by the landowners. A reading of this case

establishes that the District Court would not have permitted the declaration of taking to stand if the government had not increased its deposit from a nominal sum of $1.

Appellant, in its brief, cites United States v. Carey, 143 F. 2d, 445, 450 (C. A. 9, 1945) and United States v. Hayes, 172 F. 2d 677, 679 (C. A. 9, 1949) in support of its contention that the District Court does not have jurisdiction to dismiss a declaration of taking. It is to be observed that in neither of these cases was the issue of lack of good faith or non-compliance with the condemnation statute by the government raised. Hence, these cases are not in point.

Unless this Court follows those cases which indicate that the District Court may review the question of lack of good faith on the part of the government in arriving at its estimate of just compensation, the landowner will be at the mercy of arbitrary, capricious action on the part of government officials.

The United States Supreme Court in United States v. Miller, 317 U.S. 369, 381, 63 S. Ct. 276, 283, 87 L. Ed. 336, has stated that the purpose of the statute providing for a declaration of taking and the deposit of estimated compensation is two-fold. One purpose being to give the government immediate possession and relieve it of the burden of interest. The other to give the de-

fendant landowner immediate cash compensation to the extent of the government estimate of the value of his property. If the appellant in this case is permitted to deposit only the nominal sum of $1 with the Court upon the filing of its declaration of taking, and, if the District Court does not have power to review the good faith of the appellant in arriving at the estimate of $1, then the landowners are without remedy and by the capricious, arbritrary, bad faith action of a public official may be deprived of their property without the benefit of partial compensation while awaiting trial of the condemnation case on the issue of just compensation. If the rule argued for by the appellant is recognized, it means that any agency of the government can acquire immediate possession of any parcel of property within the Ninth Circuit by the device of depositing $1 with its declaration of taking regardless of value of the property involved and regardless of the lack of good faith on the part of the government agency in making the estimate of $1 as compensation to be deposited with the Court. This could result in reducing many landowners to a condition of poverty while awaiting trial of their condemnation cases. The rule contended for by the appellant will effectively eliminate the requirement of statute that an estimate of just compensation must be made and deposited with the Court.

ANSWER TO SPECIFICATION OF ERROR II

POINTS AND AUTHORITIES

I

Where the good faith of the acquiring authority is unequivocally challenged and is supported by a prima facie showing of lack of good faith and non-compliance with the statute, a justiciable issue is presented.

Simmonds v. United States, 199 F. 2d 305, 307 (C. A. 9, 1952)
United States v. 44.00 acres of land, 110 F. Supp 168, 171, reversed 234 F. 2d 410 (C. A. 2, 1956)
United States v. 45.33 acres of land, 266 F. 2d 741 C. A. 4, 1959)
United States v. 1,997.66 acres of land, 137 F. 2d 8, 14 (C. A. 8, 1943)

II

Findings made by the trial court will not be reversed on appeal unless clearly erroneous and will be affirmed, if supported by any substantial evidence.

Gailbreath v. Homestead Fire Insurance Co., 185 F. 2d 361 (C. A. 9, 1950)
Smyth v. Barneson, 181 F. 2d 143, (C. A. 9, 1950)

III

"Estimate" means to set a value on, or to appraise.

United States v. Foster, 131 F. 2d 3, 7 (C. A. 8, 1942)

IV

"Just compensation" is the value of the property taken at the time of the taking.

United States v. Johns, 146 F. 2d 92, 93 (C. A. 9, 1944)
Oliver v. United States, 155 F. 2d 73, 75 (C. A. 8, 1946)

V

"Bad faith" is a term of variable significance, hence of broad application. It implies breach of faith, wilful failure to respond to plain, well understood, statutory obligations.

National Labor Relations Board v. Knoxville Publishing Co., 124 F. 2d 875, 883 (C. A. 6, 1942)
7 C.J.S. 1317, Bad Faith

VI

The deposit of $1 nominal damages in Court does not constitute the deposit of just compensation required by the statute.

Park Amusement Co. v. McCaughn, 14 F. 2d 553, 556 (D. C. Penn. 1925)

ARGUMENT

Appellees in their answer (R. 37) in their amended answer (R. 42) and in their motion to dismiss declaration of taking filed May 28, 1962 (R. 60) unequivocally challenged the good faith of appellant and alleged that the appellant failed to comply with the requirements of 40 USC 258 a-f. Appellees established a prima facie case of lack of good faith by the affidavit of Eldred T. Cobb which was attached to, and by reference made a part of the motions to strike the declaration of taking and which affidavit is set forth in the Appendix to this brief on page 32. (This affidavit was omitted from the photocopy of the transcript of the motions to strike plaintiff's declaration of taking and for that reason is included in the Appendix.)

Based upon the prima facie showing of bad faith as made by the affidavit of Eldred T. Cobb, the District Court directed that a hearing should be held on the issue of bad faith and granted the appellant the opportunity to produce evidence to overcome the prima facie case made by appellees. At the hearing, the District Court did not permit the appellees to present any testimony relative to value of the property that is being taken in the condemnation proceeding. The hearing was limited to the presentation of evidence by the appellant as to whether the deposit of $1 was

made in good faith and on the basis of some reasonable appraisal (R. 74).

On the basis of the cases cited under Points and Authorities I, supra and of the cases cited under the Answer to Specification of Error I, it is submitted that the District Court was presented with a justiciable issue and had jurisdiction to hear and determine that issue.

At the hearing, the appellant produced only one witness, Mr. Milvoy Suchy, a mining engineer who was an employe of the United States Forest Service, and who testified that he had "never appraised a mineral deposit for condemnation" (R. 107) and that he did not place a value upon the easement taken or the damages resulting to the mining claims from the taking of the easement (R. 113). The appellant introduced in evidence as Exhibit 3 a report prepared by Mr. Suchy, dated January 23, 1961, entitled "Comments on the Proposed Interruptable Easement for the Elliott Creek Road within the Boundaries of the W. L. Cobb, et al, Placer Claims" (R. 104). This report was the only information that was submitted to the Secretary of Agriculture and was the only information that was available to, and used by, him in making his determination that the sum of $1 constituted an estimate of just compensation for the easement taken.

The Suchy report does not contain an appraisal of the value of the easement taken, nor does it contain an estimate of just compensation, nor does it contain an appraisal or estimate of damages to the property rights of the appellees resulting from the taking of the easement. The only reference in his report to the effect of the easement upon the mining claimants is found in the last sentence of the report which reads: "The writer believes that the mining claimants' rights under the general mining law, are unaffected by the provisions of the proposed interruptable easement" (Ex. 3). This was also noted by the District Court in its memorandum (R. 74).

The declaration of taking statute provides that "Said declaration of taking shall contain * * * (5) a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken." 40 U.S.C. 258a (5). In United States v. Foster, 131 F. 2d 3, 7 (C. A. 8, 1942), it is stated:

> ". . . 'Estimate,' on the other hand, means: 'To set a value on or appraise.' 'To form an approximate judgment or opinion regarding the value.' 'Calculate approximately.' 'To form an opinion of.' New Century Dictionary . . ."

From an examination of the Suchy report (Ex. 3) and from the further facts revealed by the testimony of Mr. Suchy, it is apparent that no one on behalf of the government set a value on, or appraised, or made

an approximate judgment regarding the value of, the easement. Hence it follows that the estimate of $1 as set forth in the letter of the Secretary of Agriculture to the Attorney General (Ex. 4) and in the declaration of taking, was not arrived at in accordance with the requirements of the declaration of taking statute. The District Court made such a finding in the order appealed from. (R. 78-79).

It is the contention of appellees that the deposit of $1 with the declaration of taking which was not supported by an appraisal, or estimate, of the value of the easement taken, was nothing more than the payment of a nominal sum into Court and does not meet the requirement of the statute that the amount of the just compensation should be estimated and paid into Court. It follows, therefore, that such arbitrary action causes the declaration of taking to be a nullity.

Mr. Suchy, in his testimony, attempted to justify his failure to make an appraisal of the value of the easement taken by stating that it was his understanding that the appellees had been compensated for damages resulting from the construction of a road across their mining claims by the Bate Lumber Company by virtue of a $10,000 judgment granted the appellees against the Bate Lumber Company in a trespass action in the California State Court. (R. 107). In this connection the District Court found: (R. 78-79)

". . . His assessment that no damage would occur was based upon the supposition that whatever damage the road might cause had already been paid. In view of the fact that the easement herein would permit the Government to completely change the nature of the roads involved, this supposition seems patently erroneous. Mr. Suchy himself came close to admitting as much, in his statement that his report, based upon the above assumption, would be incorrect if such an assumption were incorrect.

"It thus appears that Mr. Suchy's determination that the easement herein would cause only nominal damage to the mining claims was based upon a clearly erroneous legal assumption as to the effect of the judgment against Bates Lumber Co. In view of said error, it follows that the report submitted by him to the Department of Agriculture was so defective as to amount to a mere guess as to the decrease in value to follow from the proposed easement herein. Under such a set of circumstances, it cannot be said that the estimate by the Department of Agriculture that just compensation for the taking of the easement would be $1 was made in good faith, that is, with a reasonable basis for belief as to its accuracy. It therefore follows that the Government's motion for an order of immediate possession must be denied."

It is a well established rule that the findings of the trial court will not be reversed unless clearly erroneous. Smyth v. Barneson, 181 F. 2d 143, 144 (C. A. 9, 1950).

The trial judge had the benefit of observing Mr. Suchy on the witness stand, his manner of answering questions, and was in a position to evaluate the weight

to be given his testimony. This caused the trial judge to state: "I deem it only fair to state that I, as the trier of the facts here involved, was not impressed with Mr. Suchy as a witness. To be perfectly candid, his testimony was so unsatisfactory to me as to leave me with fixed and abiding doubt concerning the opinion expressed by him." (R. 75).

Appellant, in its brief, argues that bad faith is present only where there is "fraudulent action" or where there is "actual malevolence, or spite directed toward the condemnee" (Ap. Br. 23). With this contention of appellant, we do not agree. In National Labor Relations Board v. Knoxville Pub. Co., 124 F. 2d 875, 883 (C. A. 6, 1942) it is stated:

> " 'Bad faith' is a term of variable significance, hence of broad application. In its simplest form, the phrase implies breach of faith, wilful failure to respond to plain, well-understood statutory or contractual obligations . . ."

See also 7 CJS 1317 where bad faith is defined as:

> "It has been said that 'bad faith' cannot be defined with mathematical precision, and is not a technical term used only in actions of deceit, but that it is a term of variable significance and rather broad application, and that its ultimate definition would depend upon the facts and circumstances of a given controversy . . ."

At page 1318 bad faith is defined as including "failure to perform a duly imposed duty" and the authority for

this definition is in re Hackett Hoff and Thiermann, 70 F. 2d 815, 817 (C. A. 7, 1934).

From the foregoing decisions, it is apparent that fraudulent action is not necessary to constitute action in bad faith.

The District Judge in the memorandum and order appealed from found that the Secretary of Agriculture had failed to act in good faith in making the determination that just compensation for easement taken was the sum of $1. His finding is amply supported by the evidence when it is considered that the Department of Agriculture sent a mining engineer without previous appraisal experience to make a survey of the mining claims involved and that the report submitted to the Secretary of Agriculture did not contain an appraisal of the mining claims nor an estimate of the value of the easement that was being taken by the government. Certainly, it was the duty of the general counsel for the Secretary of Agriculture to advise him that the Suchy report was wholly inadequate as a basis for making an estimate of just compensation. As the District Court pointed out in its colloquially with government counsel, if the Secretary of Agriculture had no obligation to secure competent advice and opinions upon which to base his estimate of just compensation, then it would be proper to have the Court's six-year

old grandson submit a report to the Secretary of Agriculture. (R. 130). Apparently, it is the position of appellant that a report from a six-year old child would be a sufficient basis for the Secretary of Agriculture's determination and that such action could not be reviewed by the courts.

Additional evidence to support the trial court's finding of bad faith is found in the conduct of Mr. Suchy who knew that a patent application had been filed by the appellees during 1960 prior to the filing of the condemnation action and that he had been assigned to investigate the claims as mineral examiner for the Bureau of Land Management. He testified that he had examined the claims and that at least one, if not three, of them were subject to patent. Apparently he had this knowledge when he submitted his report to the Secretary of Agriculture dated January 23, 1961. Yet, Mr. Suchy did not submit a report to the Bureau of Land Management until November, 1962. which was after the condemnation complaint and the declaration of taking in this case had been filed. If Mr. Suchy had been acting in good faith and in fulfillment of the duties of his office, he would have promptly submitted a report to the Bureau of Land Management so that the appellees' application for a patent could have been processed in a normal routine

manner long before the condemnation action was filed.

The District Court could not overlook the fact that the Suchy report and testimony failed to take into account that the appellees could be required to expend money to remove the Dutch Creek Road which has not yet been constructed. As stated in the memorandum and order of the District Court ". . . the government is presently acquiring the right to build a concrete road over what may now be merely a footpath . . ." (R. 77). The District Court further noted that if the mining operators desired to retrace their mining operation in the area in which the road had been rebuilt by the government, that the operators would face the additional task of removing rocks which had been used to buttress the rebuilt road. (R. 76). Yet, Mr. Suchy took the position that the mining claimants should be permitted only to mine their claims in one operation and that they should not be permitted to remine in any area. He refused to recognize that there is the possibility of technological development in the field of metals in the future. These were of importance to the Court because no appraisals could have been made of the value of the easement without giving consideration to these various factors of expense which were obvious. These deficiencies in the government's procedures in arriving at the determination of $1 disclose that the

action of the government was arbitrary and capricious and amounted to bad faith.

We submit that the conclusion of the trial court that the offer of $1 was an insult to the appellees is a reasonable conclusion based upon the fact that more than 40 acres of land is included within the easement and the other factors hereinabove set forth.

It must be remembered that the purpose of the hearing in the Disrict Court was not to determine the amount of just compensation that the appellees are entitled to receive for the taking of the easement across their mining claims. The only purpose of the hearing was to determine whether or not the amount of just compensation arrived at by the Secretary of Agriculture was an estimate made in good faith. The District Court expressly declared that this was the limit of his inquiry and declined to permit the appellees to put on any testimony relative to value.

Appellant on pages 31 and 32 of its brief, cites and quotes from United States v. 1,997.66 acres of land, 137 F. 2d 8, 14 (C. A. 8, 1943) to the effect that the amount of money determined by the condemning authority to be just compensation cannot be reviewed by the courts. However, we direct the Court's attention to the following quotation which also appears on page 14 of that report:

> ". . . So, too, if it should appear that the acquiring officer or authority is not acting in good faith, it may be that the court can properly refuse to allow the revised estimate to be filed or given effect as an amendment to the declaration of taking."

Appellant on page 35 of its brief, cites United States v. 2,974.49 acres, 308 F. 2d 641 (C. A. 4, 1962). We submit this case is not in point for the reason that the court of appeals found that the statutory requirements had been complied with and therefore the declaration of taking could not be dismissed. In the instant case, the issue is whether or not the statutory procedure has been complied with in good faith.

ANSWER TO PETITION FOR MANDAMUS

Appellees concur with appellant's position that the order of the District Court dated March 14, 1963, is an appealable order. This, for the reason that the order makes a final determination of rights of the appellant adverse to the appellant.

However, if this Court is of the opinion that the order of the District Court is not appealable, then appellees concur with appellant that the order of the District Court should be reviewed under the petition for mandamus.

If this appeal is not determined on its merits, it may well be that an appeal would be taken by the

government at the conclusion of the trial of the issue of just compensation. This for the reason that the measure of damages will be different if the declaration of taking is filed before or after the granting of the patent on one of the mining claims.

We shall not repeat the arguments that are set forth in our answer to specification of error I and II, but hereby direct the Court's attention to those arguments to be considered by the Court under this heading in event the Court determines that the order is not appealable and that the order is to be reviewed under the petition for mandamus.

CONCLUSION

The District Court's Memorandum and order of March 14, 1963 is abundantly supported by the evidence and by the weight of authority and should be affirmed. To hold otherwise, will be to establish the rule in the Ninth Circuit that any landowner may be dispossessed of his real property, be it his home or otherwise, upon the filing of a complaint in condemnation, a declaration of taking, and a deposit of $1 with the Clerk of the Court.

Respectfully submitted,
Hurley and Bigler
Yreka, California

Morley, Thomas & Orona
80 East Maple St.
Lebanon, Oregon

Weatherford, Thompson & Horton
130 West First Ave.
Albany, Oregon, Attorneys for Appellees

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Orval N. Thompson
of Attorneys for Appellees
Albany, Oregon 97321

APPENDIX

(Title of District Court and Cause Omitted)

AFFIDAVIT IN SUPPORT OF MOTIONS TO DISMISS COMPLAINT AND TO DISMISS DECLARATION OF TAKING

STATE OF OREGON)
) ss.
County of Linn)

I, ELDRED T. COBB, being first duly sworn on oath, depose and say:

That I am one of the defendants in the above-named condemnation action; that I reside at 215 South Fulton Street, Albany, Linn County, Oregon; that I am more than 21 years of age and that I am a citizen of the United States of America;

That I am one of the owners of the mining claims described in plaintiff's complaint and plaintiff's declaration of taking across which said mining claim plaintiff is seeking to condemn an easement for a road right of way; that I have had an interest in said mining claim since 1933 and that I have personally participated in the performance of assessment work and in mining operations that have been conducted upon certain of said claims during the intervening years; that I have personally checked the records of moneys that have been expended in connection with the assessment work performed upon and in connection with the development of said claims and that I personally know that in excess of $250,000 has been so expended and that during the past five years a sum in excess of $30,000 has been so expended, such sum is exclusive of attorneys' fees and expenses of litigation;

That I know of my own knowledge that said mining claims contain rich deposits of placer gold; that I personally have participated in conducting sampling and testing operations upon said claims and have

observed testing operations that have been conducted thereon by engineers and others; that evidence has been made available to the United States Department of Agriculture, Forest Service, based upon reliable authority of recognized mining engineers that there is no less than two million cubic yards of exposed gold-bearing and other mineral-bearing gravels upon said mining claims and that there is approximately five times more gold-bearing gravels which are covered by overburden; that a Mr. Milvoy Suchy, a mining engineer employed by the Forest Service of the United States Department of Agriculture, has by sworn deposition which was introduced in a trial in the Superior Court for Siskoyou County, California, and also in a demineralization hearing before the Bureau of Land Management of the United States Department of Interior, testified that, in his opinion, there is no less than 1,500,000 cubic yards of gold and mineral-bearing gravels exposed. These facts are and have for several years been available to the plaintiff and the agents and representatives of the plaintiff; that these gold-bearing gravels have been tested and the tests have disclosed that they contain gold values of approximately One Dollar ($1.00) per cubic yard; that the aforementioned Milvoy Suchy assisted in the tests that were made on one of these claims and that his reports of such tests are in the files of the Forest

Service of the United States Department of Agriculture and are available to plaintiff;

That during the years 1956 and 1957 a demineralization proceeding was filed against said mining claims by the Bureau of Land Management of the United States Department of Interior; that after the submission of the report of said Milvoy Suchy and the data secured by him as a result of tests made by him upon said mining claims that said demineralization proceeding was dismissed on the motion of the Government;

That prior to the filing of the above-captioned condemnation action the defendants who are the owners of said mining claims filed applications to patent three of said mining claims; that said patent applications have been diligently prosecuted and that the same are still pending; that I have been advised by the examiner for the Land Office before which said patent applications are pending that the Alta claim has been approved for a patent and that additional tests will be made upon the other two claims; namely, Bright Gold and Old Gold, which are covered by said patent applications; that patent applications are being prepared upon all of the other claims; that the filing of this condemnation action has operated to delay the filing of said patent applications on the other claims;

That said mining claims are situated in a deep ravine in the bottom of which flows Elliott Creek; that the banks of said ravine are very steep in most places; that the maintenance of a logging road over said mining claim at the location selected by plaintiff, or at any other location, will materially hinder the economic mining of said claims and will greatly reduce the value of said claims and will greatly reduce the amount of gold that can be removed therefrom; that because of the steepness of the canyon walls on both sides of Elliott Creek it is not possible to maintain a road at any location upon certain of said claims and conduct mining operations thereon at the same time and that an attempt to relocate the road at any other place on the claims in the areas where the canyon walls are steep will serve only to additionally interfere with mining operations; that the existence of any road at certain locations on certain of said mining claims will make mining of those claims virtually impossible and will make mining thereof uneconomic;

That my foregoing statements that it is not feasible to maintain any road upon certain of said mining claims and conduct mining operations thereon at the same time is substantiated by the opinion of Mr. G. Cleveland Taylor, a mining engineer of Sacramento, California, and of Mr. Hugh Wright, a mining engineer of Yreka, California; that the deposition of Mr. G.

Cleveland Taylor and the deposition of Mr. Hugh Wright was submitted to the Superior Court of the State of California in and for the County of Siskiyou in a case entitled "W. L. Cobb, et al, plaintiffs, v. Bate Lumber Company, et al, defendants, Case Number 16490," and that said depositions are and have been made available to plaintiff and various agents and representatives of plaintiff prior to the writing of this condemnation action;

That during the early part of the year 1956 Bate Lumber Company through its agents and contractors entered upon defendants' said mining claims without the permission or knowledge of the defendants and constructed a road across said mining claims over and along the area upon which plaintiff now seeks to condemn a right of way for a logging road; that these defendants protested the trespass of Bate Lumber Company upon their mining claims and filed a suit in the Superior Court of the State of California in and for Siskiyou County, Case Number 16490, seeking to restrain said Bate Lumber Company, its agents and contractors, from trespassing upon said mining claims; that the said Superior Court entered a Decree in said suit decreeing that these defendants are the owners of said mining claims and are entitled to the exclusive possession thereof and granting these defendants a permanent injunction against said Bate Lumber Com-

pany, its agents, contractors, and employees, from entering upon or otherwise trespassing upon said mining claims, or using said road so constructed by said Bate Lumber Company; that said Decree was entered in January, 1960; that during the 4-year period that the aforementioned case was in the Superior Court for Siskiyou County, California, these defendants were prevented from conducting operations upon said mining claims and as a result of attempts to conduct mining operations upon said mining claims these defendants learned that it would be impossible to conduct mining operations upon said mining claims and to maintain a logging road across said mining claims at the same time;

That agents and representatives of the Forest Service in the United States Department of Agriculture were fully informed of all phases of the above-entitled injunction suit between these defendants and Bate Lumber Company and were well aware of the Decree that was entered in said injunction suit in favor of these defendants; that during the four years consumed by the above-mentioned litigation a large number of log trucks hauled a large quantity of logs over the road constructed by said Bate Lumber Company across said mining claims; that the presence of said logging trucks and the heavy traffic thereof and the

frequency of their travels greatly impeded and interfered with defendants' attempted mining operations on their said mining claims; that if said road right of way is acquired by the Government and is open to travel by logging trucks, the presence of said trucks will effectively prevent defendants from operating their said mining claims by the use of heavy mining equipment, the fluming of water, and the use of explosives;

That all of the foregoing facts are obvious to and well known to the representatives of the Forest Service of the United States Department of Agriculture;

That the maintenance and operation of a road suitable for use by loaded logging trucks across said mining claims will result in large quantities of blasted rock, boulders, fill material and other debris being cast upon said mining claims; that the presence of said material will greatly interfere with mining operations on said mining claims; that the existence of a public road across said mining claims will expose said mining claims and any mining operations conducted thereon to the danger of pilferage and malicious destruction by persons using said road and will thereby materially reduce the market value of said mining claims; that all of the foregoing cited facts are well known to representatives and agents of the Forest Service of the

United States Department of Agriculture and were made known to them prior to the filing of the above-captioned condemnation action;

That said mining claims have a reasonable market value in excess of One Million Dollars and that purchasers are available who are willing to pay that amount if there is no roadway across said mining claims; that the existence of a road right of way across said mining claims such as plaintiff seeks to acquire in this action will render said mining claims valueless for sale or lease or other exploitation purposes;

That there has never been an appraisal made of said mining claims by the Government nor an appraisal made of the damages that will be suffered by defendants as a result of said road right of way being acquired across said mining claims by plaintiff in this condemnation proceeding; that there has been no good-faith determination made by any official or representative of the Government of the amount of money that would constitute just compensaation for the road right of way that plaintiff seeks to acquire across said mining claims in this condemnation action; that the sum of One Dollar ($1.00) which has been deposited with the Declaration of Taking by the plaintiff is a sham and capricious act and does not represent any compensation whatsoever as is required by Section 258 A

of Title 40 USC; that in making said deposit in the sum of One Dollar ($1.00) with the Declaration of Taking the agents and representatives of plaintiff acted capriciously and arbitrarily and in bad faith and in utter and complete disregard of the rights of these defendants and of the requirements of the Statute; that no representative of the Government has ever negotiated in good faith or otherwise with these defendats or any of them seeking to acquire said right of way; that representatives of the Government did threaten these defendants that unless these defendants gave the road right of way to the Government without compensation whatsoever that the Government would acquire immediate possession thereof by depositing the sum of One Dollar ($1.00) in Court and that the Government would thereby acquire the right to use said right of way without payment of just compensation into the registry of the Court; that the foregoing threats were made to these defendants in the office of Supervisor of the Rogue River National Forest in Medford, Oregon; that said representatives of the Government acknowledged to these defendants that said mining claims have a substantial value but that the Government was anxious to secure immediate possession of the road right of way and did not have a sufficient appropriation to pay the extent of damage that would be sustained by these defendants as the

result of a road right of way being acquired across the mining claims; that said Government representatives further acknowledged that they were aware that these defendants had exhausted most of their financial resources in the previous litigation with Bate Lumber Company and were not in a position to engage in protracted condemnation litigation;

That I am willing and able to be present and testify before the Court and on behalf of the defendants will produce and have present in Court the engineers and other expert witnesses who can give direct testimony as to the value of the mining claims in the event the Court desires to have further testimony.

Eldred T. Cobb

Subscribed and sworn to before me this 24th day of May, 1962.

Dolores Haslem
Notary Public for Oregon

My Commission Expires:
April 19, 1963